Misclassification

Who is an Employee vs. an Independent Contractor?

Employee

If you hire an individual who does NOT have employees, 99% of the time, they are YOUR employee for the purposes of Workers' Compensation (WC), and YOU are responsible for their insurance coverage.

If you're an employer, who has one or more employees, and you hire another "individual," most likely that individual is YOUR employee.

You're considered an employer when an individual performs work for you that would otherwise have to be performed by yourself or an employee, the individual IS your employee.

If an employer has any doubt as to the proper classification of a worker, the Department recommends that workers' compensation insurance be purchased. This coverage will minimize the risk to an employer.

Independent Contractor

The Department, and the Vermont court, narrowly interprets exceptions to workers' compensation coverage requirements. Again, most individuals you hire, even when they consider themselves to be an independent contractor, will be considered your employee.

An independent contractor is someone you hire who:

- Performs a job that is not similar or connected to your business, and
- Whose work you have no direction or control over

The Department uses two tests to determine if a worker is an independent contractor or an employee.

"Right to control"

The "Right to Control" test demonstrates that an employer "controls" the worker.

This test does not require an employer to actually exercise control; it merely requires that an employer could, if it chose to do so, exercise control over the employee.

QUESTIONS:

The following list of sample questions can assist in the determination of an employer-employee relationship. This list of questions is not exclusive. In addition, no one question is determinative.

A. "RIGHT TO CONTROL" TEST

1. Who controls the means and methods of the work performance?

2. Does the worker hold his services out to the general public?

3. Does the worker perform the task without supervision?

4. Does the worker possess the required permits, licenses and certificates?

5. Is the worker doing business as a corporation or under an assumed business name?

6. Does the work require extensive skill, education or experience?

7. Who establishes the routine or schedule?

8. What is the duration of the relationship?

9. What is the method of payment, whether by time or by job?

10. Are taxes deducted or withheld from the workers' check?

11. Who determines the hours of work?

12. Does the worker receive fringe benefits or bonuses?

13. Who provides the equipment necessary for completion of the work task?

If the totality of responses to these questions leads to the conclusion that an employer "controls" its worker, then the analysis concludes and the employee must be insured for workers' compensation purposes.

However, if the cumulative results determine the individual should not be classified as an employee under the "right to control" test, then the next list of questions must be asked.

"Nature of Business Test"

If the "right to control" test fails to identify a worker as an employee for workers' compensation purposes, then the "nature of the business" test must be applied.

Under the "nature of the business test," two questions are asked to determine whether the work performed by the alleged independent contractor is work that would otherwise be performed by the employers, employees who would have workers' compensation coverage.

Questions:

1. Is the work being performed of the type that normally could be carried out by an

employee in the usual course of business?

2. Are the activities being performed by the workers an integral part of the employer's regular business?

If the response to these questions is yes, then a statutory employee-employer relationship exists, and the employer must provide workers' compensation coverage for that worker.

Real Life Examples

The following examples may prove helpful when determining whether a worker is properly classified as an employee or an independent contractor for workers' compensation purposes.

1. Under the "right to control" test, a truck driver is an employee when the company/employer exerts the requisite amount of control over their drivers. Specifically, if the employer instructs the driver on maintaining, parking and loading the truck; provides specific travel routes to the driver; instructs him not to drive during inclement weather; pays all maintenance and fuel costs for the truck and handles all contracting with third parties; then the employer controls the truck-driving activities. Therefore, an employee-employer relationship exists between the parties and workers' compensation is required. [1]

2. A manufacturer is a "statutory employer", for workers' compensation purposes, of a worker hired through a temporary agency, where the manufacturer owned the premises and carried on the business where the worker worked, supervised the work, and had the power to replace the worker if the work was unsatisfactory. [2]

3. A manufacturer that owned lumber to be shipped to its factory was in the business of hauling lumber, and thus was the statutory employer of a worker hired under contract to haul the lumber and load it on railcars at a specified price per thousand. If the work being performed pertains to the business, trade, or occupation carried on by the claimed employer for pecuniary gain, then the person performing the work is an employee, even if hired as an independent contractor. [3]

4. A landowner, who is not in the lumber or logging business, but hires a logger to cut and remove trees from the land is not the "statutory employer" of a worker hired by the logger to assist in cutting and removing the timber. [4] The logging work was not part of the landowner's regular trade or business and the landowner did not direct the means or method the work was to be performed.

[1] Falconer v. Richard and Janet Cameron, d/b/a R&J Cameron Leasing Company, 151 Vt 530 (1989)

[2] Candido v. Polymers, Inc., 166 Vt. 15 (1996) (Court rejected workers attempt to sue manufacturer in tort, concluding that exclusive remedy was workers' compensation.)

[3] O'Boyle v. Parker-Young Co., 95 Vt. 58 (1921)

[*4] King v. Snide, 144 Vt. 395 (1984).*